Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

CONSOLIDATED DEVELOPMENT CORPORATION and CONSOLIDATED CUBAN OIL & GAS RIGHTS CORPORATION,

Petitioners,

v.

SHERRITT, INC., SHERRITT INTERNATIONAL, INC., CANADA NORTHWEST ENERGY LIMITED, THE REPUBLIC OF CUBA, CUBAPETROLEO, COMMERCIAL CUPET, S.A., UNION DE LAS EMPRESAS DE NIQUEL, GENERAL NICKEL COMPANY, S.A., MOA NICKEL, S.A., INTERNATIONAL COBALT COMPANY, INC., THE COBALT REFINERY COMPANY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

LAWRENCE R. METSCH
Counsel of Record
BENJAMIN R. METSCH
METSCH & METSCH, P.A.
1455 N.W. 14th Street
Miami, Florida 33125
(305) 545-6400

MARK I. DUNAEVSKY
525 Grove Street
Suite 5A
Evanston, Illinois 60201
(847) 869-8319

Attorneys for Petitioners

167705

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

In *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619-620 (1992), this Court stated:

> Finally, Argentina argues that a finding of jurisdiction in this case would violate the Due Process Clause of the Fifth Amendment, and that, in order to avoid this difficulty, we must construe the "direct effect" requirement as embodying the "minimum contacts" test of *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Assuming, without deciding, that a foreign state is a "person" for purposes of the Due Process Clause . . . , we find that Argentina possessed "minimum contacts" that would satisfy the constitutional test. *By issuing negotiable debt instruments denominated in United States dollars and payable in New York and by appointing a financial agent in that city, Argentina " 'purposefully availed itself of the privilege of conducting activities within the [United States].' "*

Respondent Sherritt, Inc. ("Sherritt"), a Canadian corporation, in 1993 and 1994, successfully offered for sale $300,000,000 worth of debt instruments, denominated and payable in United States dollars, in the United States. In connection with those offerings, Sherritt completed two registrations under the Federal Securities Acts, appointed two registered agents for service of process (one in the State of Washington and the other in the State of New York), and named as the debt instruments' trustee the First National Bank of Chicago. The two offerings were underwritten by Goldman, Sachs & Co. Sherritt's regulatory filings and prospectuses disclosed its activities in Cuba.

In 1996, Petitioner Consolidated Development Corporation and its assignee, Petitioner Consolidated Cuban Oil & Gas Rights Corporation (collectively "Consolidated"), brought suit in the United States District Court, Southern District of Florida, against Sherritt, The Republic of Cuba, and their related corporate entities, alleging that the defendants had converted, and were continuing to convert, the oil and gas rights which had belonged to Consolidated before their expropriation by the Castro regime in 1959 (Case No. 98-1620-Civ-Graham). Sherritt and its affiliates ("the Canadian Defendants") appeared in the District Court, but the Republic of Cuba and its governmental entities and corporations ("the Cuban Defendants") did not.

The District Court, in an unpublished order, invoked the "act of state" doctrine and dismissed Consolidated's First Amended Complaint for failure to state a claim upon which relief could be granted. Thereafter, the District Court *sua sponte* vacated the clerk's defaults which had been entered against the Cuban Defendants and entered a final judgment in favor of all the defendants. Consolidated appealed to the United States Court of Appeals, Eleventh Circuit (Case Nos. 97-5726 and 97-5953).

The Court of Appeals affirmed, but *not* on the basis of the "act of state" doctrine. Instead, the Court of Appeals held that Consolidated had not satisfied the "consistent with the Constitution and laws of the United States" criterion of Rule 4(k)(2), Federal Rules of Civil Procedure, for the assertion of personal jurisdiction over the Canadian Defendants. The Eleventh Circuit did not address the District Court's disposition of Consolidated's claims against the Cuban Defendants.

The question presented is for this Court's consideration is:

Was the "minimum contacts" requirement of the Due Process Clause of the Fifth Amendment to the United States Constitution, as it pertained to the assertion of personal jurisdiction over the Canadian Defendants pursuant to Rule 4(k)(2), Federal Rules of Civil Procedure, satisfied in this case?

STATEMENT PURSUANT TO RULE 29.6

Each Petitioner states that it has no corporate parent and that no publicly held company owns 10% or more of its stock.

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Consolidated respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Order of the U.S. District Court, Southern District of Florida (per William Turnoff, U.S. Magistrate Judge), granting the Canadian Defendants' motion to dismiss under Rule 12(b)(6), Federal Rules of Civil Procedure (Pet. App. 22a-37a) is not published. The Court of Appeals' opinion (per Circuit Judges Edmondson and Barkett, Circuit Judges, and Cohill, District Judge) affirming the District Court's judgment for lack of personal jurisdiction over the Canadian Defendants (Pet. App. 1a-18a) is published. *Consolidated Development Corporation v. Sherritt, Inc.*, 216 F.3d 1286 (11th Cir. 2000).

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and order on July 5, 2000. On March 30, 2001, it denied Consolidated's motion for rehearing. (Pet. App. 19a-21a).Consolidated invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

RULE PROVISION INVOLVED

Rule 4(k)(2), Federal Rules of Civil Procedure, provides:

> If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

STATEMENT OF THE CASE

A. *This Court's Weltover Decision*

In *Republic of Argentina v. Weltover, Inc., supra*, this Court held:

> Finally, Argentina argues that a finding of jurisdiction in this case would violate the Due Process Clause of the Fifth Amendment, and that, in order to avoid this difficulty, we must construe the "direct effect" requirement as embodying the "minimum contacts" test of *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Assuming, without deciding, that a foreign state is a "person" for purposes of the Due Process Clause. . . , we find that Argentina possessed "minimum contacts" that would satisfy the constitutional test. *By issuing negotiable debt instruments denominated in United States dollars and payable in New York and by appointing a financial agent in that city, Argentina " 'purposefully availed itself of the privilege of conducting activities within the [United States].' "* *(Emphasis supplied)*

504 U.S. at 619-620.

B. *Sherrit's "Minimum Contacts" With, By Means Of Sales Of Debt Securities In, The United States*

In March, 1993, Sherritt, then known as Sherritt Gordon Limited, in the United States publicly offered for sale US$200,000,000 in 9.75% notes due April 1, 2003. Sherritt filed with the United States Securities and Exchange Commission ("SEC") a Form F-1, Registration Statement, which reflected that its:

> (a) legal counsel in the United States was the Chicago, Illinois, firm of Mayer, Brown & Platt;

(b) agent for the receipt of service of process in the United States was Mr. Donald R. Peeno, Vice President and General Manager, Sherritt Fertilizers, Inc., 7600 N.E. 41 Street, Suite 195, Vancouver, Washington 98662;

(c) underwriter was the firm of Goldman, Sachs & Co., New York, New York;

(d) indenture trustee was The First National Bank of Chicago, Chicago, Illinois; and

(e) transfer agent in the United States was The First Chicago Trust Company of New York, New York, New York.

Pertinent excerpts from Sherritt's 1993 SEC Form F-1 follow:

> Since the Company does not mine nickel and cobalt, it must purchase sufficient nickel and cobalt feed to maintain its refinery operations at full capacity. In 1991, the Company successfully concluded a long-term feed supply agreement with the nickel-producing subsidiary of the Government of Cuba. The Company currently anticipates that it will obtain feed containing approximately 50% of its nickel inputs and 75% of its cobalt inputs from Cuba until 2005. Since the Cuban feed has a high cobalt concentration than other nickel feed, the Company has launched an initiative to increase the annual cobalt production capacity of its Fort Saskatchewan refinery to 4.5 million lbs. This initiative is expected to be completed in 1993.

* * *

The Company will use $158.2 million of the estimated net proceeds from the sale of the Notes offered hereby to repay outstanding bank indebtedness. The balance of such net proceeds, estimated at $89.2 million (based on the noon rate of exchange as reported by the Bank of Canada on December 31, 1992 of $1.00 equals US$0.7868), will be used for general corporate purposes, which may include the acquisition of businesses that are related or complementary to the Company's existing businesses. Pending such use, such excess proceeds are expected to be invested in short-term and marketable investments.

* * *

The Company has entered into certain incremental production sharing contracts with the Government of Cuba. The contracts require the Company to provide services and technical assistance to rework and enhance the production of existing oil fields in return for a percentage of the incremental oil production. The contracts also allow for the accelerated recovery of the Company's costs. During 1992, the Company performed work on 16 wells in several fields in the Varadero area . . .

* * *

The Company sells its Cuban oil production to the Government of Cuba at a price based on an international reference price for crude oil of comparable quality.

* * *

The Company's major supplier of nickel and cobalt feed is the Union del Niquel, the nickel producing subsidiary of the Cuban Ministry of Basic Industries.[1] In 1992, the Union del Niquel supplied feed containing approximately 50% of the Company's nickel inputs and 75% of its cobalt inputs. The Company expects the Union del Niquel to supply similar amounts in 1993 and to continue to be a major feed supplier to its Fort Saskatchewan facility until the end of 2005. The Union del Niquel supplies a nickel-cobalt sulphide concentrate containing approximately 55% nickel and 5% cobalt. The Union del Niquel does not have the capability to produce refined nickel and cobalt from this feed.

* * *

The Indenture and the Notes will be governed by and construed in accordance with the laws of the State of New York.

* * *

The Company will appoint CT Corporation System, 1633 Broadway, New York, New York, 10019, as its agent for service of process in any suit, action or proceeding with respect to the Indenture or the Notes and for actions brought under federal or state securities laws brought in any federal or state court located in The City of New York and will submit to such jurisdiction.

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1. Union De Las Empressas De Niquel is one of the Cuban Defendants in this case.

In March, 1994, Sherritt, by then known as Sherritt, Inc., in the United States publicly offered for sale US$100,000,000 in debentures due March 31, 2014. Sherritt filed with the SEC a Form F-10, Registration Statement,[2] which reflected that its:

> (a) legal counsel in the United States was the firm of Mayer, Brown & Platt;
>
> (b) agent for the receipt of service of process in the United States was Mr. Peeno; and
>
> (c) underwriter was the firm of Goldman, Sachs & Co.

Pertinent excerpts from Sherritt's 1994, SEC Form F-10 follow:

> The Company has entered into certain incremental production sharing contracts with the Government of Cuba. The contracts require the Company to provide services and technical assistance to rework and enhance the production of existing oil fields in return for a percentage of the incremental oil production. The contracts also allow for the accelerated recovery of the Company's costs. During 1993, the Company performed work on 38 wells in several fields in Cuba . . .
>
> The Company sells its Cuban oil production to the government of Cuba at a price based on an international reference price for crude oil of comparable quality.

---

2. In that SEC Form F-10, Sherritt also registered Cdn.$135,000,000 in notes due March 31, 2004, which were to be paid in United States dollars from funds paid by Sherritt in Canadian dollars and exchanged for U.S. dollars by Sherritt's exchange rate agent.

In summary, Sherritt "sold" its Cuban oil to the Cuban Government, which in turn "sold" nickel and cobalt to Sherritt.[3]

Sherritt, in November, 1995, offered its shareholders the rights to subscribe for up to 73,686,912 certificates, which would be exchangeable into the restricted voting shares of Sherritt International Corporation, a new Canadian corporation formed to take possession and control of Sherritt's operations in Cuba. Those securities were neither registered nor offered for sale in the United States. The prospectus which accompanied that rights offering noted:

> In late 1994 and early 1995, Sherritt received written communications from two U.S. enterprises purporting to be former owners of properties now owned by Moa Nickel[4] and from one U.S. enterprise purporting to be a former owner of certain petroleum exploration rights and property interests on lands in Cuba in respect of which Sherritt International currently has an interest (these enterprises are hereafter referred to as the "U.S. Claimants"). In their communications, the U.S. Claimants alleged that the Government of Cuba had expropriated their properties and rights without compensation in 1959 and 1960, and they explicitly or implicitly threatened legal proceedings against Sherritt.

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3. Pre-trial discovery revealed that, in practice, the Cuban Government extended "credit" to Sherritt for the value of the oil delivered by Sherritt to the Cuban Government. That "credit" was set-off against the price which Sherritt paid to the Cuban Government for the nickel and cobalt which was exported to Canada for processing at Sherritt's Fort Saskatchewan refinery.

4. Moa Nickel, S.A., is one of the Canadian Defendants in this litigation.

To the best of Sherritt's knowledge, no such legal proceedings have been commenced. Nor, based on its understanding of U.S. law, does Sherritt believe that such legal proceedings would be sustained by U.S. courts. Under the "act of state" doctrine, U.S. courts generally decline to adjudicate the validity of a taking of property by a foreign sovereign government in the absence of a treaty or other unambiguous agreement regarding controlling legal principles. Although exceptions to the doctrine may permit claimants to recover specific property within the jurisdiction of the court (*e.g.*, products from an expropriated facility or revenues generated by that facility came into the United States), the restrictions imposed by the U.S. embargo against Cuba make it highly unlikely that any products or revenues generated by Cuban properties of Sherritt International will enter the United States.

Furthermore, regardless of the "act of state" doctrine, claims by U.S. nationals arising from foreign government expropriations have been resolved historically not by private litigation but by diplomatic settlements between the foreign governments and the United States. In such settlements, the United States "espouses" on behalf of its nationals their claims for compensation, and it negotiates a comprehensive resolution of behalf of all U.S. nationals. The first step in the "espousal" process is the referral of a claim to the U.S. Foreign Claims Settlement Commission ("FCSC"), which considers and certifies the validity and value of U.S. nationals' claims against foreign governments. The FCSC completed its work with respect to claims against

> the Government of Cuba nearly 25 years ago, and the U.S. Claimants indicate that the FCSC certified their claims against the Government of Cuba. Once the U.S. Claimants have had their claims certified by the FCSC, it is questionable under U.S. law whether they can "decertify" them so as to pursue them independently of the diplomatic efforts of the United States government.
>
> GNC[5] has agreed to indemnify Sherritt International and Sherritt for any damages to Sherritt International and Sherritt arising directly or indirectly from the resolution of U.S. claims relating to property now owned by Moa Nickel. Any failure by GNC to fulfil its indemnity obligation would result in an offset against its share of assets upon any dissolution of the Metals Enterprise.

C. *Consolidated's Certified Claim*

On June 30, 1971, the United States Foreign Claims Settlement Commission ("the FCSC"), by Decision No. CU-5979 on Claim No. CU-2535, acting pursuant to 22 U.S.C. § 1643b, certified Consolidated's claim that its property had been expropriated by the Republic of Cuba and quantified Consolidated's loss as $832,470.58 (Pet. App. 38a-46a).

D. *Proceedings In The District Court*

On July 3, 1996, Consolidated filed suit against Sherritt, the Republic of Cuba and their related entities for the ongoing, illegal expropriation of exploitation of Consolidated's property in Cuba.

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5. General Nickel Company, S.A., is one of the Cuban Defendants in this lawsuit.

The District Court, in the course of dismissing Consolidated's First Amended Complaint on the basis of the "act of state" doctrine, held inapplicable the Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2)[6], because Consolidated's concessions and leases did not quality as "property" before that tribunal (Pet. App. 27a-34a). In addition, the District Court declined to apply the "commercial activity" exception to the "act of state" doctrine, which had garnered a plurality of the membership of this Court in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976) (Pet. App. 34a-36a).

The District Court did not address the Canadian Defendants' motions to dismiss under Rule 12(b)(2), Federal Rules of Civil Procedure. Consequently, it did not determine whether it possessed personal jurisdiction over the Canadian Defendants pursuant to Rule 4(k)(2), Federal Rules of Civil Procedure.[7]

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6. Section 2370(e)(2), Title 22, U.S. Code, the "Second Hickenlooper Amendment", in relevant part provides:

> [N]o court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits . . . in any case in which a claim of title or other right to property is asserted by any party . . . based upon (or traced through) a confiscation or other taking . . . by an act of that state in violation of the principles of international law.

7. The Canadian Defendants supported their Rule 12(b)(2) motions to dismiss with the affidavits of the following corporate officials:

(1) Mr. Donald M. Kossey, the former controller of Sherritt, Inc.

(2) Mr. Murray M. Skinner, the Vice President/Legal of Canada Northwest Energy Limited.

(Cont'd)

E. *The Court Of Appeals' Affirmance, But On A Different Ground*

Consolidated appealed to the Eleventh Circuit. Instead of addressing the District Court's "act of state doctrine" rationale, the Court of Appeals focused exclusively upon the existence of personal jurisdiction over the Canadian Defendants pursuant to Rule 4(k)(2), Federal Rules of Civil Procedure. Passing by the question whether Consolidated's claims arose "under federal law", the Court of Appeals, in an opinion written by U.S. District Judge Maurice B. Cohill, Jr. (of the U.S. District Court, Western District of Pennsylvania, sitting by designation), determined that the District Court's exercise of personal jurisdiction over the

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(Cont'd)

(3) Mr. Dennis G. Maschmeyer, the Chief Operating Officer of The Cobalt Refining Co., Inc.

(4) Mr. Werner Bink, the Chief Operating Officer of Moa Nickel, S.A.

(5) Mr. Frederic J. Wellhauser, the President of Sherritt International, Inc.

(6) Mr. Garnet Clark, the Chief Financial Officer of International Cobalt Company, Inc.

Mr. Bink was unavailable for deposition examination. However, Consolidated's counsel deposed Messrs. Kossey, Skinner, Maschmeyer, Wellhauser and Clark in Toronto, Ontario, Canada. Each of them denied knowing whether any of the net proceeds of Sherritt's 1993 and 1994 public offerings of debt securities in the United States had been invested in the Canadian Defendants' Cuban operations. However, Mr. Kossey testified that the net proceeds of those public offerings had been deposited in Sherritt's accounts with the Canadian Imperial Bank of Commerce, where they had been commingled with Sherritt's other funds and upon which had been drawn checks the proceeds of which had been used to pay for Sherritt's tangible investments, and for the services of the Sherritt employees working, in Cuba.

Canadian Defendants was *not* "consistent with the Constitution and laws of the United States."

Consolidated timely moved for rehearing and rehearing en banc, which motions were denied on March 30, 2001.

REASON FOR GRANTING THE WRIT

The Decision Below Conflicts With This Court's Decision In *Republic Of Argentina v. Weltover, Inc., supra.*

In *Omni Capital International, Ltd. v. Rudolph Wolff & Co., Ltd.*, 484 U.S. 97 (1987), this Court held that the District Court had lacked personal jurisdiction over British third-party defendants because there was no implied authorization for nationwide service of process under the private cause of action provision of the Commodity Exchange Act ("the CEA") and the requirements of Louisiana's long-arm statute had not been satisfied. Justice Blackmun's opinion for this Court observed:

> We are not blind to the consequences of the inability to service process on Wolff and Gourlay. A narrowly tailored service of process provision, authorizing service on an alien in a federal-question case when the alien is not amenable to service under the applicable state long-arm statute, might well serve the ends of the CEA and other federal statutes. It is not for the federal courts, however, to create such a rule as a matter of common law. That responsibility, in our view better rests with those who propose the Federal Rules of Civil Procedure and with Congress.

484 U.S. at 111.

Rule 4(k)(2), Federal Rules of Civil Procedure, was adopted effective December 1, 1993. The Advisory Committee in part stated:

> There remain constitutional limitations on the exercise of territorial jurisdiction by federal courts over persons outside the United States. These restrictions arise from the Fifth Amendment rather than from the Fourteenth Amendment, which limits state-court reach and which was incorporated into federal practice by the reference to state law in the text of the former subdivision (e) that is deleted by this revision. The Fifth Amendment requires that any defendant have affiliating contacts with the United States sufficient to justify the exercise of personal jurisdiction over that party. Cf. *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 418 (9th Cir.1977). There also may be a further Fifth Amendment constraint in that a plaintiff's forum selection might be so inconvenient to a defendant that it would be a denial of "fair play and substantial justice" required by the due process clause, even though the defendant had significant affiliating contacts with the United States. See *DeJames v. Magnificent Carriers*, 654 F.2d 280, 286 n. 3 (3rd Cir.), *cert. denied*, 454 U.S. 1085 (1981). Compare*World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293-294 (1980); *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 (1982); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-78 (1985); *Asahi Metal Indus. v. Superior Court of Cal., Solano County*, 480 U.S. 102, 108-13 (1987). See generally R. Lusardi, *Nationwide Service of Process: Due*

Process Limitations on the Power of the Sovereign, 33 Vill.L.Rev. 1 (1988).

* * *

> This narrow extension of the federal reach applies only if a claim is made against the defendant under federal law. It does not establish personal jurisdiction if the only claims are those arising under state law or the law of another country, even though there might be diversity or alienage subject matter jurisdiction as to such claims. If, however, personal jurisdiction is established under this paragraph with respect to a federal claim, then 28 U.S.C. § 1367(a) provides supplemental jurisdiction over related claims against that defendant, subject to the court's discretion to decline exercise of that jurisdiction under 28 U.S.C. § 1367(c).

Thus, there are two prongs to the application of Rule 4(k)(2), Federal Rules of Civil Procedure. First, the action must arise under federal law. Second, the defendant must have "minimum contacts" with the United States, consistent with the Due Process Clause of the Fifth Amendment to the Constitution.

Consolidated argued below that this case had arisen under federal law for the reason that a claim arising under international law also arises under federal law. In support of that contention, Consolidated asserted in the District Court and the Court of Appeals that the Second Hickenlooper Amendment had federalized international law in expropriation cases.

The Eleventh Circuit did not address this aspect of Rule 4(k)(2), Federal Rules of Civil Procedure. Instead, it focused exclusively upon the existence or non-existence of the "minimum contacts" required by the Fifth Amendment's Due Process Clause to warrant the assertion of personal jurisdiction over a non-resident foreign defendant.

While this Court has yet to issue a decision interpreting the Fifth Amendment Due Process Clause element of Rule 4(k)(2), Federal Rules of Civil Procedure, the United States Courts of Appeals have in numerous instances done so, both confirming[8] and rejecting[9] the existence of personal jurisdiction over non-resident defendants. In two instances, the Federal Appellate Courts have remanded for further proceedings concerning the existence of personal jurisdiction

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8. *See United States v. Swiss American Bank, Ltd.*, 191 F.3d 30 (1st Cir. 1999); *Chew v. Dietrich*, 143 F.3d 24 (2d Cir.), *cert. denied*, 525 U.S. 948 (1998); *In re Pintlar Corporation*, 133 F.3d 1141 (9th Cir. 1997), *cert. denied sub nom. Rowland v. Goodson* and *Inoco Ltd. v. Goodson*, 524 U.S. 933 (1998); *United States Securities and Exchange Commission v. Carrillo*, 115 F.3d 1540 (11th Cir. 1997); and *In the Matter of An Application To Enforce Administrative Subpoena Duces Tecum of the Securities and Exchange Commission v. Knowles*, 87 F.3d 413 (10th Cir. 1996).

9. *See Submersible Systems, Inc. v. Perforadora Central, S.A. de C.V.*, 249 F.3d 413 (5th Cir. 2001); *Doe v. Unocal Corporation*, 248 F.3d 915 (9th Cir. 2001); *Central States, Southeast and Southwest Areas Pension Fund v. Reimber Express World Corporation*, 230 F.3d 934 (7th Cir. 2000), *cert. denied*, __ U.S. __, 121 S. Ct. 1406 (2001); *BP Chemicals Ltd. v. Formosa Chemical & Fibre Corporation*, 229 F.3d 254 (3d Cir. 2000); *Consolidated Development Corporation v. Sherritt, Inc., supra*; *Associated Transport Line, Inc. v. Productos Fitosanitarios Proficol El Carmen, S.A.*, 197 F.3d 1070 (11th Cir. 1999); *Red Wing Shoe Company, Inc. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355 (Fed. Cir. 1998); and *American Telephone & Telegraph Company v. Compagnie Bruxelles Lambert*, 94 F.3d 586 (9th Cir. 1996).

under the rule.[10] With the exception of this case, none of the reported Federal Appellate Court decisions has dealt with a non-resident defendant which had completed a public offering of securities in the United States, necessarily requiring the filing of a registration statement with the U.S. Securities and Exchange Commission and the appointment of an agent for the receipt of service of process.

The Eleventh Circuit's Fifth Amendment Due Process Clause-based personal jurisdiction determination in this case cannot be squared with this Court's Fifth Amendment Due Process Clause-based personal jurisdiction decision in *Republic of Argentina v. Weltover, Inc., supra.* For this reason alone, Consolidated's petition for writ of certiorari should be granted. *See* Rule 10(c), Supreme Court Rules.

In addition, the granting of Consolidated's petition for writ of certiorari would make it possible for this Court to provide authoritative guidance to the Federal Trial and Appellate Courts concerning the contours of the Fifth Amendment Due Process Clause as incorporated in Rule 4(k)(2), Federal Rules of Civil Procedure. *See*, Rule 10(a), Supreme Court Rules.

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10. *See System Pipe & Supply, Inc. v. M/V Viktor Kurnatovskiy*, 242 F.3d 322 (5th Cir. 2001); and *World Tanker Carriers Corp. v. MV Ya Mawlaya*, 99 F.3d 717 (5th Cir. 1996).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

LAWRENCE R. METSCH
Counsel of Record
BENJAMIN R. METSCH
METSCH & METSCH, P.A.
1455 N.W. 14th Street
Miami, Florida 33125
(305) 545-6400

MARK I. DUNAEVSKY
525 Grove Street
Suite 5A
Evanston, Illinois 60201
(847) 869-8319

Attorneys for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED JULY 5, 2000

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 97-5726, 97-5953

CONSOLIDATED DEVELOPMENT CORPORATION, a Delaware Corporation, Consolidated Cuban Oil and Gas Rights Corporation, a Florida Corporation,

Plaintiffs-Appellants,

v.

SHERRITT, INC., a foreign corporation, a.k.a. Viridian Inc., Sherritt International, Inc., a foreign corporation, et al.,

Defendants-Appellees.

July 5, 2000

Appeals from the United States District Court for the Southern District of Florida (No. 96-01820-CIV-DLG), Donald L. Graham, Judge

Before EDMONDSON and BARKETT, Circuit Judges, and COHILL*, District Judge.

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* Honorable Maurice B. Cohill, Jr., U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

Appendix A

COHILL, District Judge:

Plaintiffs-Appellants Consolidated Development Corporation and Consolidated Cuban Oil & Gas Rights Corporation (collectively "Consolidated"), are United States corporations whose Cuban subsidiaries formerly held oil concessions and leases to drill for oil in the Republic of Cuba. These concessions were expropriated by the Cuban government in 1959.[1] In 1996, Consolidated filed this action for damages against the Republic of Cuba, four Cuban corporations, and two Canadian corporations and their affiliates. Consolidated here appeals the district court's dismissal, under Fed.R.Civ.P. 12(b)(6), of its claims against the Canadian corporations and their affiliates, for failure to state a claim upon which relief could be granted

We may, of course, affirm the district court on any adequate grounds, including grounds other than those upon which the district court actually relied. *Parks v. City of Warner Robins,* 43 F.3d 609, 613 (11th Cir.1995). In addition, we are mindful of this court's own responsibility to ascertain jurisdiction in the first instance. *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231, 110 S.Ct. 596, 607, 107 L.Ed.2d 603 (1990); *University of S. Ala. v. American Tobacco Co.,* 168 F.3d 405, 410 (11th Cir.1999). Furthermore, "[a]n appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review." *Mitchell v. Maurer,* 293 U.S. 237, 244,

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1. Plaintiffs' claim that its property was expropriated by the Republic of Cuba was certified by the United States Foreign Claims Settlement Commission on June 30, 1971, by Decision No. CU-5979 on Claim No. CU-2535. R1-2 at ¶ 19.

55 S.Ct. 162, 165, 79 L.Ed. 338 (1934). We conclude that the district court lacked personal jurisdiction over the Canadian corporations and their affiliates, and we will affirm on jurisdictional grounds without reaching the substantive questions raised by this appeal.

Dr. Alberto Diaz Masvidal, president of both Consolidated corporations, appears *pro se* and appeals the denial of his motion for intervention and other relief. Given our conclusion that the district court lacked jurisdiction over any of the defendants, we will affirm the district court's denial of his motion to intervene.

I.

This appeal is from a decision dismissing appellants' claims, and thus we take our factual framework from the allegations made in the first amended complaint, to the extent that they remain uncontroverted by the defendants' affidavits and depositions. Appellants filed this action against two Canadian corporations and their affiliates: Viridian, Inc. (f/k/a Sherritt, Inc.), and Viridian's affiliate, Canada Northwestern Energy Ltd. ("CNW"); and Sherritt International Corporation ("Sherritt International"), and its affiliates, The Cobalt Refinery Co., Inc. ("Corefco"), International Cobalt Company, Inc. ("ICCI"), and Moa Nickel, S.A. ("Moa Nickel").[2]

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2. We note that district court documents as well as the briefs submitted to this Court, group the defendants in various ways. For convenience here, we will refer to Viridian, CNW, Sherritt International, ICCI, Corefco, and Moa Nickel collectively as the "Canadian defendants," which is how these defendants denominate themselves in their brief on appeal.

Appendix A

Viridian, CNW, and Sherritt International are organized under Canadian law and have their principal places of business in Canada. R1-2 at ¶¶ 3, 4, 5. Sherritt International is a wholly-owned subsidiary of Viridian. R1-2 at ¶ 4. Their operations include the production and marketing of fertilizers, the production and sale of oil and natural gas, the mining, refining, and sale of cobalt and nickel, and the development, marketing, and production of advanced industrial materials and metallurgical technologies. R1-2 at ¶ 6.

Defendant Corefco is organized under Canadian law as well. R1-2 at ¶ 14. Fifty per cent of its stock is held by Viridian and Sherritt International, and 50% is owned by General Nickel Co., S.A. ("GNC"), one of the defendant Cuban corporations. R1-2 at ¶ 14.

Defendant Moa Nickel is a corporation organized under the laws of Cuba with its principal place of business in Cuba. R1-2 at ¶ 12. Half of its stock is owned by GNC, and the other half by Viridian and Sherritt International. R1-2 at ¶ 12.

Defendant ICCI is a corporation organized under the laws of The Bahamas. R1-2 at ¶ 13. Its stock, too, is equally owned by GNC and by Viridian and Sherritt International. R1-2 at ¶ 13.

GNC, Moa Nickel, ICCI, and Corefco are included on the United States Department of the Treasury's list of "Blocked Persons and Specially Designated Nationals," for purposes of the United States government's embargo against Cuba. R1-2 at ¶¶ 11-14.

Appendix A

In addition to the claims against these defendants, Consolidated also filed suit against the Republic of Cuba and four Cuban corporations: Cubapetroleo ("Cupet"), Commercial Cupet, S.A. ("Commercial Cupet"), Union de las Empresas de Niquel ("Union"), and the aforementioned GNC. R1-2 at ¶¶ 7-11.

Consolidated contends that Viridian, Sherritt International, and CNW (the order of dismissal calls these the "Viridian defendants") hold a working interest in four oil production contracts with Cuba, Cupet, and Commercial Cupet. R1-2 at ¶ 21. These are production-sharing contracts, under which Viridian provides technical assistance in return for a percentage of the incremental oil production. According to the complaint, these contracts encompass most of the oil fields in Cuba, including Consolidated's expropriated properties and rights. R1-2 at ¶ 21.

Consolidated claims that Viridian's share of the oil produced from these wells is sold to the Republic of Cuba, which pays Viridian with nickel and cobalt ore. R1-2 at ¶ 21. Viridian also operates a cobalt and nickel refining operation through its affiliates Moa Nickel, Corefco, and ICCI, and uses these materials, *inter alia,* in its fertilizer production business. R1-2 at ¶¶ 23, 25, 26. Consolidated contends that some of these products find their way to markets in the United States, and that this arrangement violates international law by wrongfully converting properties and rights which the Cuban government expropriated from Consolidated in 1959. R1-2 at ¶¶ 25, 27.

The district court referred motions and discovery matters to a magistrate judge. Viridian, Corefco, CNW, Sherritt

International, Moa Nickel, and ICCI, filed motions to dismiss under Fed.R.Civ.P. 12(b)(6). These defendants also filed motions to dismiss for lack of personal jurisdiction under 12(b)(2). Both grounds for dismissal were thoroughly briefed and argued. The magistrate judge permitted Consolidated to conduct limited discovery on the question of jurisdiction, and allowed the plaintiffs to file a supplemental memorandum on jurisdiction after taking the depositions.[3]

On April 2, 1997, the magistrate judge heard oral argument on all motions to dismiss. On July 30, 1997, the court dismissed plaintiffs' claims against Viridian, Corefco, CNW, and ICCI for failure to state a cause of action under 12(b)(6). R4-117. The motions to dismiss pursuant to 12(b)(6) filed by defendants Moa Nickel and Sherritt

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3. Consolidated deposed Donald M. Kossey, Controller of Viridian; Murray A. Skinner, Vice President, Legal, of CNW; Frederic J. Wellhauser, President and Chief Executive Officer of Sherritt International; Dennis G. Maschmeyer, Chief Operating Officer of Corefco; and Garnet Clark, Chief Financial Officer of ICCI. Each had provided an affidavit in support of the motions to dismiss for lack of personal jurisdiction. A sixth executive and declarant, Werner Bink, Chief Operating Officer of Moa Nickel, was unavailable at the time of the depositions. Mr. Clark, who is also Chief Financial Officer of Moa Nickel, was made available to answer questions about that corporation.

Following these depositions, Consolidated filed a supplemental memorandum on the issue of jurisdiction, entitled "Plaintiffs' Post-Jurisdictional [Deposition] Discovery Memorandum of Law in Opposition to Defendants' Motions under Rule 12(b)(2), Federal Rules of Civil Procedure, to Dismiss the First Amended Complaint." R4-103.

International were granted by order dated September 18, 1997, in accordance with the court's July 30 opinion. R5-141. The court determined that plaintiffs' claims were barred by the act of state doctrine, and did not reach the jurisdictional question.[4] All other motions in the case, including the motions to dismiss under Rule 12(b)(2) for lack of personal jurisdiction, were deemed moot. R4-107.

The court did not adjudicate Consolidated's claims against the Republic of Cuba or any of the Cuban defendants. Indeed, although the court directed the United States Department of State to serve the complaint on the Cuban corporations, it is not clear from the record that these defendants were ever served. A default judgment was entered against the Republic of Cuba on July 31, 1997. R4-114.

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4. The act of state doctrine is a rule of judicial restraint, which operates to prohibit a United States court from judging the validity of an act of a foreign sovereign taken within its own territory. *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 405, 110 S.Ct. 701, 107 L.Ed.2d 816 (1990). As the United States Supreme Court emphasized in *Underhill v. Hernandez*, 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456 (1897), "[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of a government of another, done within its own country." *Id.* at 252, 18 S.Ct. 83. Plaintiffs argued that their case fell within two exceptions to the act of state doctrine: the Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2), and the so-called "commercial activity" exception to the doctrine. The magistrate judge determined that neither exception applied, and dismissed the claims against each moving defendant.

Appendix A

After some procedural delay, the district court entered a final judgment on October 7, 1997 in favor of Viridian, CNW, Sherritt International, Corefco, ICCI, and Moa Nickel, dismissing all claims against them. R5-151.

Dr. Alberto Diaz Masvidal, *pro se,* moved to intervene on October 20, 1997. R5-152. On November 7, 1997, the district court issued an omnibus order which mooted Dr. Masvidal's motion to intervene as well as all other outstanding motions in the case. The order also vacated the default judgment against the Republic of Cuba, and dismissed plaintiffs' claims against Cuba without prejudice. Dr. Masvidal's motion to stay and his petition for a re-hearing were denied, and the case was closed as to all defendants. R6-160. This appeal followed.

We have jurisdiction over a final decision of a district court under 28 U.S.C. § 1291.

II.

Whether a federal court has personal jurisdiction over a defendant is a question of law and subject to *de novo* review. *Sculptchair, Inc. v. Century Arts, Ltd.,* 94 F.3d 623, 626 (11th Cir.1996). Where a district court does not conduct an evidentiary hearing on the question, the burden is on the Plaintiff to establish a prima facie case of personal jurisdiction over a nonresident defendant. *Madara v. Hall,* 916 F.2d 1510, 1514 (11th Cir.1990), citing *Morris v. SSE, Inc.,* 843 F.2d 489, 492 (11th Cir.1988). A prima facie case is established if the Plaintiff presents enough evidence to withstand a motion for directed verdict. *Id.* We must accept

the allegations in the complaint as true, to the extent that they are uncontroverted by the Defendant's affidavits and depositions, and must construe all reasonable inferences in favor of the Plaintiff. *Id.*

III.

The amended complaint relies on Fed.R.Civ.P. 4(k)(2), the national long-arm statute, as the basis of personal jurisdiction over the Canadian defendants.[5] R75 at ¶ 17. Where, as here, a defendant is not subject to the jurisdiction of the courts of general jurisdiction of any one state, Rule 4(k)(2) permits a court to aggregate a foreign defendant's nationwide contacts to allow for service of process provided that two conditions are met: (1) plaintiff's claims must "arise under federal law;" and, (2) the exercise of jurisdiction must be "consistent with the Constitution and laws of the United States." Fed.R.Civ.P. 4(k)(2). Consolidated contends that the necessary source of federal law may be found in the Second Hickenlooper Amendment, codified at 22 U.S.C. § 2370(e)(2), the International Claims Settlement Act, 22 U.S.C. § 1621 *et seq.*, or in international law. We need not reach this argument, however, since we find that the Appellants have not met the second prong of the analysis.

Jurisdiction "consistent with the Constitution and laws of the United States" is that which comports with due process. Considerations of due process require that a non-resident

5. Appellants insist that the district court improperly dismissed their claims against the Canadian defendants without permitting them to engage in jurisdictional discovery. The record, however, shows otherwise. See *supra* at 2844, n. 3.

defendant have certain minimum contacts with the forum,[6] so that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. *Borg-Warner Acceptance Corp. v. Lovett & Tharpe, Inc.*, 786 F.2d 1055, 1057 (11th Cir.1996), quoting *International Shoe v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). The nature and quality of these contacts, however, vary depending upon whether the type of personal jurisdiction being asserted is specific or general.

Specific jurisdiction arises out of a party's activities in the forum that are related to the cause of action alleged in the complaint. *Madara v. Hall*, 916 F.2d 1510, 1516 n. 7 (11th Cir.1990), citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 nn. 8 & 9, 104 S.Ct. 1868, 1872 nn. 8 & 9, 80 L.Ed.2d 404 (1984). It has long been recognized that a court has the minimum contacts to support specific jurisdiction only where the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958). The requirement that there be minimum contacts is grounded in fairness. It assures that "the defendant's conduct and connection with the forum State [is] such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980).

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6. Where service of process has been effected pursuant to Rule 4(k)(2), the applicable forum for the minimum contacts analysis is the United States. *United States Securities and Exchange Commission v. Carrillo*, 115 F.3d 1540, 1544 (11th Cir.1997).

General personal jurisdiction, on the other hand, arises from a defendant's contacts with the forum that are unrelated to the cause of action being litigated. The due process requirements for general personal jurisdiction are more stringent than for specific personal jurisdiction, and require a showing of continuous and systematic general business contacts between the defendant and the forum state. *Borg-Warner,* 786 F.2d at 1057, citing *Hall,* 466 U.S. at 412-13, 104 S.Ct. at 1872-73.

Although Appellants strenuously argue that we need only find the minimum contacts required for specific jurisdiction, it is clear to us that the applicable due process requirements are the more restrictive ones of general jurisdiction. The allegations in this complaint do not arise out of any contacts the Canadian defendants have with the United States. Rather, the cause of action involves properties in Cuba, which were expropriated by the Cuban government, and which have allegedly been developed by the Canadian defendants. Thus, we must find the basis of the district court's exercise of personal jurisdiction, if any, under the stricter standard of general jurisdiction, and must decide whether the Canadian defendants have had continuous and systematic general business contacts with the United States sufficient to subject them to the jurisdiction of its courts. *Delong Equip. Co. v. Washington Mills Abrasive Co.,* 840 F.2d 843, 844 (11th Cir.1988) (quoting *Perkins v. Benguet Consolidated Mining Co.,* 342 U.S. 437, 438, 72 S.Ct. 413, 414, 96 L.Ed. 485 (1952)).

Appellants were questioned closely at oral argument about the Canadian defendants' contacts with the United

States, and could identify only the three contacts listed in their supplemental memorandum: (1) in March of 1993 and March of 1994, Viridian issued bonds and debentures in the United States; (2) in connection with these offerings, Viridian appointed an agent for service of process in the United States; and (3) Viridian's fertilizer and chemicals are marketed through a subsidiary, Viridian Fertilizers, Inc. (f/k/a Sherritt Fertilizers, Inc.) ("VFI"), in the United States. R4-103 at 22-23. Our review of the record reveals no other contacts between Viridian and the forum.

We emphasize that a nonresident corporation's contacts with the forum that are unrelated to the litigation must be substantial in order to warrant the exercise of personal jurisdiction under Rule 4(k)(2). *Associated Transport Line, Inc. v. Productos Fitosanitarios Proficol El Carmen, S.A.*, 197 F.3d 1070, 1075 (11th Cir.1999), citing *Madara*, 916 F.2d at 1516. For example, merely purchasing materials, even if done regularly, is not contact sufficient to support personal jurisdiction. *Hall*, 466 U.S. at 418, 104 S.Ct. at 1878, citing *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516, 518, 43 S.Ct. 170, 171, 67 L.Ed. 372 (1923). Holding meetings in the forum state to sign a boilerplate contract will not support specific jurisdiction. *Sea Lift, Inc. v. Refinadora Costarricense de Petroleo, S.A.*, 792 F.2d 989, 993-94 (11th Cir.1986). Placing advertisements in a newspaper is not a sufficient connection to the forum for in personam jurisdiction. *Johnston v. Frank E. Basil, Inc.*, 802 F.2d 418 (11th Cir.1986).

We find that Viridian's limited and sporadic connections with the forum are not the sort of general systematic business

contacts required to sustain the assertion of general personal jurisdiction. Plaintiffs first point to the fact that Viridian's predecessor twice issued bonds and debentures to investors in the United States. This court has not previously considered whether a securities offering in the forum supports general jurisdiction over a non-resident corporation. However, in *SEC v. Carrillo,* a specific jurisdiction case, this court recently addressed the conduct of a Costa Rican corporation which offered securities to United States investors. 115 F.3d 1540 (11th Cir.1997). The SEC brought an action for securities fraud. On the jurisdictional issue, we found that by placing advertisements and articles for the securities in airlines' magazines, mailing materials and application forms to American investors, maintaining domestic bank accounts in connection with the offering, and mailing at least one stock certificate to a United States investor, the corporate defendant had purposefully availed itself of the forum sufficient to support specific personal jurisdiction.

In the action before us, Viridian has had far fewer contacts with the United States, and, since the offering of debentures had absolutely nothing to do with the claims presently being litigated, the minimum contacts required are much more stringent. We decline to find that by offering bonds and debentures in the United States, several years before this action was filed, Viridian exhibited the sort of systemic business contacts with the forum that are consistent with the assertion of general personal jurisdiction. As we noted in *Sea Lift, Inc. v. Refinadora Costarricense de Petroleo, S.A.,* 792 F.2d 989, 992 (11th Cir.1986), where a foreign corporation does not engage in general business in the forum, simply negotiating a contract there will not support general in personam jurisdiction.

We also reject Plaintiffs' argument that Viridian is amenable to service of process under Rule 4(k)(2) because it appointed an agent for service of process in connection with the offerings of bonds and debentures. The casual presence of a corporate agent in the forum is not enough to subject the corporation to suit where the cause of action is unrelated to the agent's activities. *International Shoe*, 326 U.S. at 317, 66 S.Ct. 154.

Courts of appeals that have addressed this issue have rejected the argument that appointing a registered agent is sufficient to establish general personal jurisdiction over a corporation. *Bankhead Enterprises, Inc. v. Norfolk & Western Railway Co.*, 642 F.2d 802, 805 (5th Cir., Unit B, April 15, 1981);[7] *Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 183 (5th Cir.1992); *Ratliff v. Cooper Laboratories, Inc.* 444 F.2d 745, 748 (4th Cir.1971); accord *Sofrar, S.A. v. Graham Engineering Corp.*, 35 F.Supp.2d 919, 921 (S.D.Fla.1999) (finding no general jurisdiction under Florida's long-arm statute, even though defendants appointed an agent for service of process and were registered to do business in the state); *Moore v. McKibbon Brothers, Inc.*, 41 F.Supp.2d 1350, 1354 (N.D.Ga.1998) (finding general jurisdiction under North Carolina's long-arm statute where, in addition to appointing a registered agent, the corporation owned and leased property and was registered to transact business in the state).

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7. The Eleventh Circuit has adopted as precedent all Fifth Circuit cases decided before September 30, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir.1981).

Finally, we must reject Consolidated's assertion that Viridian is amenable to service of process under Rule 4(k)(2) because a subsidiary, Viridian Fertilizers, Inc. ("VFI"), markets the defendant's products in the United States. It is well established that as long as a parent and a subsidiary are separate and distinct corporate entities, the presence of one in a forum state may not be attributed to the other. *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333, 337, 45 S.Ct. 250, 251, 69 L.Ed. 634 (1925). Generally, a foreign parent corporation is not subject to the jurisdiction of a forum state merely because a subsidiary is doing business there. Where the "subsidiary's presence in the state is primarily for the purpose of carrying on its own business and the subsidiary has preserved some semblance of independence from the parent, jurisdiction over the parent may not be acquired on the basis of the local activities of the subsidiary." *Portera v. Winn Dixie of Montgomery, Inc.*, 996 F.Supp. 1418, 1423 (M.D.Ala.1998), quoting Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1069 (2d ed.1987).

For Consolidated to persuade us that the district court had general personal jurisdiction over Viridian because of VFI's activities in the United States, it would have to show that VFI's corporate existence was simply a formality, and that it was merely Viridian's agent. *Id.* Consolidated has not carried its burden. Viridian's controller, Donald M. Kossey, provided an affidavit regarding the corporation's organization and later testified at a deposition during jurisdictional discovery. Kossey stated that Viridian is a Canadian corporation, organized under Canadian law and having its principal place of business in Canada. Kossey

Decl. R1-17 at 1. Viridian has not been registered to do business in the United States. Kossey Decl. R1-17 at 3. Viridian does not have employees in the United States and does not own property there. Kossey Decl. R1-17 at 4. VFI, on the other hand, is incorporated in the state of Washington and has its principal place of business there. Kossey Decl. R1-17 at 3; Kossey Dep. R4-84 at 26. It also maintains warehouse facilities in California and Idaho. Kossey Dep. R4-84 at 13. Kossey testified that VFI has its own officers and boards of directors, determines its own pricing and marketing practices, has its own bank accounts offices, and employees. Kossey Decl. R1-17 at 3; Kossey Dep. R4-84 at 47. Appellants have come forth with no evidence to contradict these assertions, and we find nothing in the record to indicate that VFI's activities should be imputed to its corporate parent for the purpose of finding general personal jurisdiction over Viridian.

Certainly none of these contacts between Viridian and the United States, taken individually, supports general jurisdiction. Rule 4(k)(2) permits us to aggregate a non-resident defendant's contacts with the forum for the minimum contacts analysis; we have done so and find that the contacts which Consolidated has identified, even when considered together, fall far short of the showing we deem necessary for due process. Accordingly, we find that the district court lacked general personal jurisdiction over Viridian, and we will affirm the dismissal of all claims against this defendant on jurisdictional grounds.

With regard to the other Canadian defendants, Appellants conceded at oral argument that Sherritt International and its

three affiliates, Moa Nickel, Corefco, and ICCI, have never done any business in the United States. The record shows that none of these corporations are registered to do business in the United States; none of them have sold products, maintained offices or employees, or owned property in the United States. Wellhauser Decl. R2-45 at 2; Maschmeyer Decl. R1-15 at 2; Clark Decl. R3-60 at 2; Bink Decl. R2-46 at 2. The amended complaint is devoid of any allegations that these defendants have had any contacts with the United States. Furthermore, Moa Nickel, ICCI, and Corefco are included on the United States Department of the Treasury's list of "Blocked Persons and Specially Designated Nationals," and therefore are prohibited from doing business in the United States.

Likewise, Appellants conceded that defendant CNW currently has no operations at all, in this country or elsewhere. When the complaint in this action was filed, CNW was a subsidiary of Viridian, but had previously conveyed its Cuban oil and gas business to a subsidiary of Sherritt International. Skinner Dep. R4-84 at 35-36. CNW did have subsidiaries in the United States with oil, gas, or geothermal leases, all but one of which were liquidated in 1992, before this lawsuit was filed. Skinner Decl. R1-17 at 2; Skinner Dep. R4-84 at 37-42. The remaining subsidiary was a Montana corporation with its own officers and board of directors, which owned a dormant geothermal lease. Skinner Decl. R1-17 at 2; Skinner Dep. R4-84 at 45-51. These contacts are so inconsequential that they cannot possibly support the district court's assertion of general personal jurisdiction over CNW. Accordingly, we find that the district court lacked personal jurisdiction over Consolidated's claims

against defendants Sherritt International, Moa Nickel, Corefco, ICCI, and CNW, and we will affirm the dismissal of all claims against these defendants.

IV.

Due process requires that the Canadian defendants have sufficient regular and systematic business contacts with the United States to justify the exercise of general personal jurisdiction over them. We find that the meager contacts alleged against these defendants are not sufficient to subject them to the jurisdiction of the district court under Rule 4(k)(2), and that Dr. Masvidal's motion to intervene was properly denied. We therefore AFFIRM.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MARCH 30, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Nos. 97-5726-GG & 97-5953-GG

CONSOLIDATED DEVELOPMENT CORPORATION, a Delaware Corporation, CONSOLIDATED CUBAN OIL AND GAS RIGHTS CORPORATION, a Florida Corporation,

Plaintiffs-Appellants,

versus

SHERRITT, INC., a foreign corporation, a.k.a. Viridian Inc., SHERRITT INTERNATIONAL, INC., a foreign corporation, *ET AL.*,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

Before EDMONDSON and BARKETT, Circuit Judges, and COHILL*, District Judge.

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* Honorable Maurice B. Cohill, Jr., United States Circuit Judge for the Western District of Pennsylvania, sitting by designation.

Appendix B

BY THE COURT:

Appellees' Motion to Correct the Court's opinion of July 05 2000 is GRANTED. The opinion shall be revised as follows, beginning at page 4:

> International Cobalt Company, Inc. ("ICCI"), and Moa Nickel, S.A. ("Moa Nickel").[2]
>
> Viridian, CNW and Sherritt International are organized under Canadian law and have their principal places of business in Canada. R1-2 at ¶¶ 3, 4, 5. Their operations include the production and marketing of fertilizers, the production and sale of oil and natural gas, the mining, refining, and sale of cobalt and nickel, and the development, marketing, and production of advanced industrial materials and metallurgical technologies. R1-2 at ¶6.
>
> Defendant Corefco is organized under Canadian Law as well. R1-2 at ¶14. Fifty percent of its stock is held by Sherritt International, and 50% is owned by General Nickel Co., S.A. ("GNC"), one of the defendant Cuban corporations. Maschmeyer Decl. R1-15 at ¶2.

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2. We note that district court documents as well as the briefs submitted to this Court, group the defendants in various ways. For convenience here, we will refer to Viridian, CNW, Sherritt International, ICCI, Corefco, and Moa Nickel collectively as the "Canadian defendants," which is how these defendants denominate themselves in their brief on appeal.

Appendix B

Defendant Moa Nickel is a corporation organized under the laws of Cuba with its principal place of business in Cuba. R1-2 at ¶12. Half of its stock is owned by GNC, and the other half by Sherritt International. Bink Decl. R2-46 at ¶2.

Defendant ICCI is a corporation organized under the laws of The Bahamas. R1-2 at ¶13. Its stock, too, is equally owned by GNC and by Sherritt International. Clark Decl. R3-60 at ¶2; Clark Depos. R4-84 at 7.

Appellants' Motion to Strike and alternate motion for a jurisdictional hearing are DENIED. The argument of Appellants is without merit. The ownership of Sherritt has no effect on the personal jurisdictional issues on which the opinion was decided.

The petition for rehearing filed by Appellants, Consolidated Development Corporation and Consolidated Cuban Oil and Gas Rights Corporation is DENIED.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED JULY 30, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 96-1820-CIV-GRAHAM

CONSOLIDATED DEVELOPMENT CORPORATION, CONSOLIDATED CUBAN OIL AND GAS RIGHTS CORPORATION,

Plaintiff,

vs.

SHERRITT, INC., SHERRITT INTERNATIONAL, INC., CANADA NORTHWEST ENERGY LIMITED, THE REPUBLIC OF CUBA CUBAPEROLEO, COMMERCIAL CUPET, S.A., UNION DE LAS EMPRESAS DE NIQUEL, GENERAL NICKEL COMPANY, S.A., MOA NICKEL, S.A., INTERNATIONAL COBALT COMPANY, INC., and THE COBALT REFINERY COMPANY INC.,

Defendants.

ORDER

This Cause is before the undersigned Magistrate Judge on consent of the parties for final resolution of several motions to dismiss. Presently pending before the undersigned are the Canadian Defendants' *Joint Motion to Dismiss Under 12(b)(6)* (D.E. 18) and International Cobalt Company Inc.'s *Motion to Dismiss Under Rule 12(b)(6)* (D.E. 62).

Appendix C

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs Consolidated Development Corporation and Consolidated Cuban Oil and Gas Rights Corporation ("Consolidated") bring this action alleging that Defendants are engaged in mining operations in the Republic of Cuba that infringe on prior property rights owned by Plaintiffs in violation of 22 U.S.C. §2370(e)(2) and international law. Plaintiffs are United States companies who prior to 1959, owned several subsidiaries, including Petroleo Cruz Verde, S.A. and Cuban Land Oil Company, S.A. These subsidiaries were Cuban corporations that held oil concessions, royalties in leases, and oil field equipment to drill for oil in Cuba. This case stems from a law passed by the Cuban Government, in November of 1959, which was adopted after Fidel Castro's accession to power and cancelled all applicable and oil exploitations or concessions, including the rights of Plaintiffs' subsidiaries.

In early 1970, Plaintiffs filed a claim with the United States Foreign Claims Settlement Commission (the "FCSC"). The FCSC found that Plaintiffs' rights with respect to the profit, which it controlled through its Cuban subsidiaries were effectively taken by the Cuban Government on November 23, 1959.

Plaintiffs now bring this action contending that the Canadian companies Sherritt/Sherritt International and Canada Northwestern Energy Limited (hereinafter the "Viridian Defendants"), hold a working interest in four oil production sharing contracts with Cuba, Cubapetroleo ("Cupet"), and Commercial Cupet, S.A. encompassing most

of the oil fields in Cuba. Plaintiffs allege that Defendants are exploiting properties and rights that formerly belonged to Plaintiffs' subsidiaries.

The contracts of which Plaintiffs complain require the Viridian Defendants to provide technical assistance to enhance the production of certain oil wells in return for a percentage of oil production. Plaintiffs assert that this oil is sold to Cuba which pays for the oil with nickel and cobalt ore. Plaintiffs allege that these raw products are sent to Canada where they are refined into cobalt or nickel briquettes or fertilizer for consumer sale. Plaintiffs assert that many of these products are then sold in the United States. Plaintiffs contend that Defendants' enterprise violates international law by wrongfully converting the properties and rights formerly belonging to Plaintiffs.

Defendants now move for dismissal of this action pursuant to Fed.R.Civ.P. 12(b)(6). Defendants contend that Plaintiffs' Complaint fails to state a claim upon which relief can be granted. Defendants argue that the Complaint is defective because Plaintiffs' claims require this Court to rule on the validity of an official act of a foreign sovereign and is thus barred under the act of state doctrine. Plaintiffs respond that their claims fall under two exceptions to the doctrine.

ANALYSIS

I. *The Act of State Doctrine*

The act of state doctrine is a rule of judicial restraint which prohibits a United States court from passing judgment

on the validity of an act of a foreign sovereign taken within its own territory. *W.S. Kirkpatrick & Co. v. Environmental Tectronics Corp.*, 493 U.S. 400, 405 (1990). This doctrine prohibits United States courts from reaching the merits of an issue in order to avoid embarrassment of foreign governments in politically sensitive matters and interference with our own foreign policy. *In re Grand Jury Proceedings Bank of Nova Scotia*, 740 F.2d 817, 831 (11th Cir. 1984). The modern formulation of the doctrine stems from the Supreme Court's classic decision in *Underhill v. Hernandez*, 168 U.S. 250 (1987) in which the Court states:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Id. at 252.

The public capacity of the actors involved in the suit or the governmental acts of a nondefendant state may serve to trigger the act of state doctrine. *West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 828 (9th Cir. 1987). Generally, "[w]hen the causal chain between defendant's alleged conduct and the plaintiff's injury could not be determined without an inquiry into the motives of the foreign government, the defense has been successful . . . ." *Id.*

Appendix C

Here Defendants argue that adjudication of this case would tread squarely on the diplomatic and political sensitivities that the doctrine seeks to insulate from judicial intrusion. Defendants contend that the gravamen of Plaintiffs' Complaint is that the Government of Cuba expropriated their oil concessions and that Plaintiffs have a right to sue the Canadian Defendants for benefitting from the alleged expropriation. Defendants insist that adjudication of this case would directly contradict the considered judgment of both the Executive and Legislative Branches of our government respecting policy towards Cuba.[1] Accordingly, Defendants state that this is an action in which the act of state doctrine mandates dismissal.

The Court agrees that unless some exception applies, this action falls under the preclusive boundaries of the act of state doctrine. It is clear that the adjudication of Plaintiffs' claims requires the Court to declare the expropriation by the Cuban government of Plaintiffs' oil concessions in Cuba invalid. Plaintiffs, however respond that their claims are saved by two exceptions to the act of state doctrine: the Second Hickenlooper Amendment and the commercial activity exception.

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1. Defendants point out that these same issues have been the subject of heated controversy between the United States and its allies, especially Canada, because of the passage of the Helms-Burton Act. That part of the Helms-Burton Act which would permit United States citizens to sue private entities that traffic in expropriated Cuban property has been suspended by the President on three occasions.

Appendix C

A. *The Second Hickenlooper Amendment*

The Second Hickenlooper Amendment, 22 U.S.C. §2370(c)(2), overrides the judicially created act of state doctrine. The Amendment provides in relevant part that:

> [N]o court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits . . . in a case in which a claim of title or other right to property is asserted by any party . . . based upon (or traced though) a confiscation or other taking . . . by an act of that state in violation of the principles of international law.

22 U.S.C. §2370(e)(2). The statute prohibits a United States court from invoking the act of state doctrine to abstain from judgment in cases asserting title to property that is before the court based on an act taken by a foreign sovereign in violation of international law.

In the instant case, Defendants contend that the exception does not apply because Plaintiffs' concessions and leases are not "property" before this Court. In support of their position, Defendants point to a series of decisions which arose from Cuba's expropriation of United States corporations' property, as well as two cases specifically involving oil concessions. Defendants argue that these cases clearly show that the Hickenlooper exception to the act of state doctrine is inapplicable to Plaintiffs' claims.

Defendants rely on the seminal case of *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), which led to the

enactment of the Second Hickenlooper Amendment. In *Sabbatino*, the Supreme Court applied the act of state doctrine to preclude the Court from examining the validity of a non-compensated taking even though the taking was alleged to have violated international law. There, the Court held that a claim seeking redress of property must be dismissed, even though the property had entered the United States.

In reaction to the *Sabbatino* decision, Congress enacted the Second Hickenlooper Amendment. *See Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 174 (2d Cir. 1967). The legislative intent of the Amendment was to reverse the presumption of state doctrine and to discourage illegal confiscations by foreign governments in violation of international law. *Id.* at 176. Subsequent case law explained that relief was available under the Hickenlooper Amendment when "the fruits of such illegal expropriation could be marketed with impunity in the United States." *Banco Nacional de Cuba v. First National City Bank of N.Y.*, 431 F.2d 394, 401 (2d Cir. 1970), *rev'd on other grounds*, 406 U.S. 759 (1972). In *First National*, the Second Circuit examined the legislative history of the Amendment and found it to be a narrow exception to the act of state doctrine. *Id.* at 399. Concluding such, the court held that the Amendment only applied to the isolated instances when American property that had been nationalized finds its way back into the United States. *Id.* at 401-402.

A review of the Amendment's legislative history is helpful in determining its purpose and scope. In an August, 1964, letter to the Washington Post, Senator Hickenlooper used the term "thieves' market," and explained that the

Amendment's purpose was to require American courts to apply international law "whenever expropriated property comes within the territorial jurisdiction of the Untied States." 110 Cong. Rec. 19548. In addition, when the Conference Committee reported the Amendment to the House of Representatives on October 2, 1964, Congressman Adair, its sponsor in the House, explained:

> It insures that however the case may arise or the act of state doctrine be invoked, a party who had suffered an expropriation in violation [of international law] may bring suit to assert his claim to the expropriated property if there is an attempt to market it in the United States.

110 Cong.Rec. 23680 (1964). Senator Hickenlooper described the provision in virtually identical terms the following day. *Id.* (citing 110 Cong. Rec. 24076-77 (1964)).

Subsequent cases considered this legislative history to hold that oil concessions are not property within the meaning of the Amendment. In *Occidental of Umm Al Qaywayn, Inc. v. Cities Serv. Oil Co.*, 396 F.Supp. 461 (W.D. La. 1975), *aff'd in part on other grounds*, 577 F.2d 1196 (5th Cir. 1978), *cert. denied*, 422 U.S. 928 (1979), the court held that Occidental's claim, seeking redress for a repudiation of its oil concession agreement, did not fit within the "narrow confines of the Hickenlooper Amendment." *Id.* at 471. The court held that the Amendment did not apply even though the defendant had directly imported into the United States oil that it had removed from the disputed oil fields. *Id.* at 471-472. Determining that the Amendment does not apply

to contract-based claims, the court held that a claim challenging a government's repudiation of rights under an oil lease or concession is not a "claim of title or other right to property" under the Hickenlooper Amendment. *Id.*

The Supreme Court of Texas reached the very same conclusion in *Hunt v. Coastal States Gas Prod. Co.*, 583 S.W.2d 322 (Tex.), *cert. denied*, 444 U.S. 992 (1979). There, the plaintiffs sued Coastal States for alleged conversion of oil to which the plaintiffs were entitled by virtue of a concession agreement with Libya. The Libyan government had nationalized the plaintiffs' rights under the concession agreement after Colonel Qadhafi came to power in 1969. Subsequently, the Libyan government entered into a contract with Coastal that allowed Coastal to purchase oil from the same field previously subject to the plaintiffs' concessions. A portion of the products derived from the oil was subsequently imported and sold in the United States.

The *Hunt* court found that the plaintiffs' concessions granted only a contractual "right to search for and to extract oil within the defined area for the stated term. . . . It did not grant [plaintiff] title to the oil in the strata." *Id.* at 325. Accordingly, the court found the Hickenlooper Amendment did not apply because "by its express terms [it] applies only to a claim of title or right of property. . . . Thus this exception to the act of state doctrine has no application here where only a contractual right was expropriated from [Plaintiff]." *Id.* at 326.

Based on the foregoing, Defendants contend that the Second Hickenlooper Amendment was not intended to

include the claims asserted in the instant case. First, Defendants contend that the oil concessions are contract rights, and therefore not "property" under the Amendment. Moreover, Defendants assert that even if Plaintiffs could assert a property interest, the Amendment would not apply because Plaintiffs do not allege that the property was imported or sold in the United States.

In response, Plaintiffs argue that this action does involve real property before the Court. First, Plaintiffs contend that the oil concessions are an investment rather than contracts and are therefore "rights to property" rather than mere contracts. Thus, Plaintiffs contend the concessions are the sort of investment that the Hickenlooper Amendment was designed to protect. Second, Plaintiffs argue that the decision rendered by the FCSC constitutes a document of title to property sufficient to satisfy the Amendment's requirements.

In support of their first contention, Plaintiffs rely on the Ninth Circuit's opinion in *West v. Multibanco Comerex, S.A.*, 807 F.2d 820 (9th Cir.), *cert. denied*, 482 U.S. 906 (1987). In *Multibanco*, the court held that rights arising out of certificates of deposit were rights to property within the meaning of the Hickenlooper Amendment. In *Multibanco*, the plaintiffs were individual United States investors who purchased peso and dollar denominated certificates of deposit from defendants, who were private Mexican banks. In the early 1980's, the Mexican government nationalize the banks and imposed exchange controls whereby certificates of deposit were redeemed in pesos at reduced rates of exchange. The plaintiffs sued, alleging violations of federal security laws and the illegal taking of property by a foreign state in

violation of international law. The plaintiffs alleged that the "conversion" of their dollar-denominated certificates of deposit to pesos at a rate of exchange specified by the government, a rate less than the market rate of exchange, was a taking in violation of international law.

The Ninth Circuit deemed the alleged taking as an expropriation and found that the Hickenlooper Amendment applied. The court held that the certificates of deposit, whether considered intangible property or contracts, were a property interest protected under international law from expropriation. The court said that such contracts are properly understood investments, and are therefore the type of "property" that the Hickenlooper Amendment sought to protect.

Plaintiffs' contention, that under the reasoning in *Multibanco* their concessions are an investment in property protected by the Amendment, must fail. Although Plaintiffs attempt to equate their oil concessions to "property," prior case law and the legislative history of the Amendment clearly demonstrate that these concessions are contracts which are explicitly not covered by the Amendment. Indeed, as explained *supra*, two courts have directly held that the Amendment does not apply to oil concessions. *See Occidental of Umm*, 396 F.Supp. at 461; *Hunt v. Coastal States*, 583 S.W.2d at 322. Moreover, the distinction between an investment in a financial security and in a contract to extract oil cannot be blurred. The oil concessions at issue concern the right to extract oil from Cuban territory and are by definition contractual. Although Plaintiffs expected to profit from their use of the property, the concessions share no other

similarities with a financial security. Thus, the concessions are not the type of investment protected by *Multibanco*. To extend the Amendment as far as Plaintiffs assert would create an exception so broad that it would eviscerate the act of state doctrine altogether. The Hickenlooper Amendment has never been construed so broadly.

In addition, even if the concessions were deemed real property, Plaintiffs cannot satisfy the requirement that the expropriated property be "in the United States." In an attempt to show that the disputed "property" is before the Court, Plaintiffs argue that their certified claim by the Foreign Claims Settlement Commission constitutes a "document of title" sufficient to apply the Amendment. Plaintiffs cite the *Restatement 3d of Foreign Relations* which provides that the Amendment applies only to those cases "asserting title to property before the court . . . A bill of lading or comparable document of title . . . may meet the requirements of the [Second Hickenlooper] Amendment." *Restatement* §444, comment e. Plaintiffs contend that the FCSC's finding of title in property puts this title squarely before this Court.

However, Plaintiffs have failed to identify any authority to support their suggestion that the Amendment's property requirement is satisfied by a claim certified by the FCSC. The purpose of the FCSC's certification of claims is to provide for diplomatic resolution of claims once Cuba has a favorable government, not to provide a basis for piecemeal private litigation. Moreover, the certified claim does not entitle the bearer to payment as would a bill of lading or other negotiable instrument.

Lastly, Plaintiffs fail to show that there is property before this Court. Plaintiffs do not allege that any property directly related to their cancelled concessions has entered the United States. Neither do Plaintiffs consent that their oil wells, oil, or payments owed to them are in the United States. Instead, Plaintiffs allege that oil extracted from the disputed wells is paid for with nickel and cobalt ore, essentially a substitute for currency, which then enters the United States. Such allegations are insufficient under the Amendment because "money said to represent proceeds from the sale of the property" does not meet the requirements of the Amendment. *Restatement 3d Foreign Relations* §444, comment e. The property in the United States must be directly related to the taking on which the claim is based. *Id.*

B. *Commercial Activity Exception*

Lastly, Plaintiffs assert that this suit should be adjudicated because Cuba is acting in a commercial capacity, not in a sovereign capacity, when it exploits the oil from the property. Thus, Plaintiffs assert that the so-called "commercial activity" exception applies to remove their claims from the act of states doctrine's auspices. If a court characterizes the activity at issue as commercial under this limitation, then the exception will foreclose application of the act of state doctrine even if the activity is directly conducted by the sovereign.

The viability of the "commercial activity" exception is questionable. The proposed exception first arose in the Supreme Court's decision in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976). *Dunhill* involved

the Cuban government's nationalization of five privately owned cigar manufacturers. After the nationalization, "interventors" named by the Cuban government to take control of the seized companies continued to ship cigars to American importers. Both the former owners and the interventors asserted their rights to sums due from postintervention shipments. The importers also were owed various amounts for preintervention shipments, which were later mistakenly paid to the interventors. The former owners claimed title to and demanded payments of these accounts. The District Court held that the interventors could collect unpaid amounts for postintervention shipments, but further held that the former owners, rather than the interventors, were entitled to collect for preintervention amounts mistakenly paid to interventors. On appeal, the issue before the Supreme Court was whether the interventors' refusal to return funds mistakenly paid by the importers for preintervention shipments was an act of state by Cuba precluding an adjudication against the interventors.

The *Dunhill* Court was unable to come up with a majority view. By a five to four vote, the Court refused to apply the act of state doctrine on the narrow grounds that no act of state had been proven, since the intervenors had not shown that their repudiation was a public act of those with authority to exercise sovereign powers. Justice White's plurality opinion stated that:

> [w]e decline to extend the act of state doctrine to acts committed by foreign sovereigns in the course of purely commercial operations. Because the act relied on by respondents in this case was

> an act arising out of the conduct by Cuba's agents in the operation of cigar businesses for profit, the act was not an act of state.

Id. at 706. Only three other Justices agreed with this proposition; a majority of the Court declined to endorse the "commercial exception" to the act of state doctrine.

Since *Dunhill*, few courts have recognized the commercial activity exception. In fact, neither a majority of the Supreme Court nor this Circuit has recognized an exception to the act of state doctrine for commercial activity. *See Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1115 n. 17 (5th Cir. 1985) ("Thus far we have not actually adopted the commercial activity exception").

Even if such an exception exists, it does not apply to the facts here. The act at issue in this case is the Cuban government's enactment of a statute that expropriated Plaintiffs' concessions. In *Dunhill*, the Court explained that expropriation is not a commercial activity. *See Dunhill*, 425 U.S. at 697 n. 11 (opinion of White, J.). Justice White specifically distinguished between "conduct by Cuba's agents of a commercial business for profit" and "expropriation of foreign assets located *ab initio* inside a country's territorial borders." *See also Comapnia De Gas De Nuevo Laredo v. Entex, Inc.*, 686 F.2d 322, 326 (5th Cir. 1982) (concluding that the expropriation by the Mexican government was an act of state and not a commercial act). Here, the Cuban government itself was acting in its capacity as sovereign and not merely as the commercial operator of a business. Thus, the commercial activity exception does not apply.

Based on the foregoing, the unavoidable, and perhaps regrettable, result is that Plaintiffs cannot prevail as they have not established that their action falls within the Second Hickenlooper Amendment or the commercial activity exception. Thus, despite the abhorrent acts allegedly committed by the Cuban government, the act of state doctrine prevents this Court from being a proper forum for relief. To hold otherwise, in the face of such well-established precedent, would merely be a Pyrrhic victory ripe for reversal. Accordingly, Plaintiffs' action must be dismissed.

CONCLUSION

Accordingly, it is hereby ORDERED AND ADJUDGED that the Canadian Defendants' *Joint Motion to Dismiss Under 12(b)(6)* (D.E. 18) is GRANTED and that International Cobalt Company Inc.'s *Motion to Dismiss Under Rule 12(b)(6)* (D.E. 62) is GRANTED. Therefore, all other pending motions in this case are DEEMED MOOT.

DONE AND ORDERED, in Chambers, at Miami, Florida, this 30 day of July, 1997.

s/ William C. Turnoff
William C. Turnoff
United States Magistrate Judge

APPENDIX D — AMENDED PROPOSED DECISION OF THE FOREIGN CLAIMS SETTLEMENT COMMISSION DATED JUNE 30, 1971

Claim No. CU-2535

Decision No. CU-5979

IN THE MATTER OF THE CLAIM OF

CONSOLIDATED DEVELOPMENT CORPORATION,
formerly known as
LIBYA MERCURY PETROLEUM CORPORATION

Under the International Claims Settlement
Act of 1949, as amended

* * *

AMENDED PROPOSED DECISION

By Proposed Decision dated November 23, 1970, the Commission denied this claim for the reason that claimant had not established the ownership, loss and value of the properties, including certain Cuban subsidiaries, subject of this claim. Subsequently, claimant submitted additional supporting evidence pertaining to the subject properties. The matter has been considered and the Proposed Decision is hereby amended.

This claim was filed in the first instance on April 28, 1967, by the CONSOLIDATED DEVELOPMENT CORPORATION. On May 7, 1968, the corporate name was changed to LIBYA MERCURY PETROLEUM

CORPORATION and claimant was doing business under this name at the time that the Proposed Decision was issued. However, counsel advised by letter of January 14, 1971, that the name of the claimant has again been changed to CONSOLIDATED DEVELOPMENT CORPORATION and this name of the claimant is hereby substituted in accordance with the name change.

This claim against the Government of Cuba, under Title V of the International Claims Settlement Act of 1949, as amended, was asserted in the amount of $3,000,000.00 and is based upon the loss of certain Cuban subsidiaries, including Petroleo Cruz Verde, S.A. and Cuban Land Oil Company, S.A., Cuban corporations, with oil concessions, leases and personal properties.

Section 502(1)(B) of the Act defines the term "national of the United States" as a corporation or other legal entity which is organized under the laws of the United States, or of any State, the District of Columbia, or the Commonwealth of Puerto Rico, if natural persons who are citizens of the United States own, directly or indirectly, 50 per centum or more of the outstanding capital stock or other beneficial interest of such corporation or entity.

Statements of an officer of the claimant corporation, and other evidence of record, establish that the claimant was first organized under the laws of Delaware in 1956 as the Consolidated Cuban Petroleum Corporation and is presently organized under the laws of that State. Further, the evidence discloses that at the time of filing claim there were 5,058,918 shares of stock outstanding and less than 200,000 shares were

owned by persons with residences outside of the United States, with the remainder of the shares being registered to persons with addresses within the United States. The Commission finds that claimant herein is a national of the United States within the meaning of Section 502(1)(B) of the Act.

The evidence of record includes certified balance sheets of the claimant corporation and Annual Reports for 1957-1959, inclusive, a stock prospectus prepared in 1958, data submitted to the Securities & Exchange Commission, photographs, a copy of a Dun & Bradstreet report concerning the claimant which was prepared in November 1957 and reports of geologists and other authorities concerning the exploration and production of oil in Cuba. The evidence discloses that claimant owned 98.4996% of the outstanding capital shares of Petroleo Cruz Verde, S.A. and all of the outstanding capital shares of Cuban Land Oil Company, S.A., Cuban corporations organized in 1955-1956.

Claimant asserted that the principal holdings of Petroleo Cruz Verde consisted of oil leases in the Bacuranao area of the Havana Province on which leases the company had drilled more than twenty wells, more of which had resulted in commercial production of oil. Claimant also asserted that Cuban Land Oil owned three cable tool rigs with tools and oil field equipment, and also held oil claims and royalties in leases owned by other oil companies.

The rights of claimant in the properties which it controlled through Cuban subsidiaries were affected by the Cuban Government under Law 635 of November 23, 1959.

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This law cancelled all applications for exploration and exploitation of concessions, regardless of the status thereof. While claimant filed applications for further drilling operations none of the applications were approved. Accordingly, the Commission finds that the rights of claimant with respect to the property which it controlled through Cuban subsidiaries were effectively taken by the Government of Cuba on November 23, 1959. (See *Claim of Felix Heyman*, Claim No. CU-0412, 1968 FCSC Ann. Rep. 51.)

The Act provides in Section 503(a) that in making determinations with respect to the validity and amount of claims and value of properties, rights, or interests taken, the Commission shall take into account the basis of valuation most appropriate to the property and equitable to the claimant, including but not limited to fair market value, book value, going concern value or cost of replacement.

The question in all cases, will be to determine the basis of valuation which, under the particular circumstances, is "most appropriate to the property and equitable to the claimant". This phraseology does not differ from the international legal standard that would normally prevail in the evaluation of nationalized property. It is designed to strengthen that standard by giving specific bases of valuation that the Commission shall consider.

The record includes a certified balance sheet, dated December 31, 1959, prepared in Havana, Cuba, which recites the assets and liabilities of the parent organization, including areas other than Cuba, but also includes those financial statements and related schedules, with explanatory notes, of

the claimant's Cuban subsidiaries, designated therein as a "consolidated" report. The consolidated report, as shown hereafter, reflects the assets and liabilities of the Cuban subsidiaries and an investment in Bolivia at or about the time of implementation of Law 635 by the Government of Cuba; and the Commission finds that this financial data, with the exclusion of the Bolivian investments, as discussed hereafter, appropriately establishes the value of claimant's Cuban subsidiaries at the time of loss. It reflects the following, the peso being on a par with the United States dollar:

Assets

Current assets:		
Cash	$ 1,406.00	
Accounts receivable – trade	2,823.85	
Petroleum in tanks, at market price	578.45	
Inventories of supplies	46.898.29	
Prepaid insurance	177.29	
Total current assets		$ 51,883.88
Fixed assets		
Concession requests, leaseholds and overriding royalties:		
Non-producing	417,086.77	
Producing leaseholds	122,581.40	
	539,668.17	

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Equipment	248,859.14	
Intangible drilling costs	59,925.55	
Casing awaiting removal from well	17,501.42	
	865,954.28	
Less accumulated depreciation, depletion and amortization	126,099.80	
		739,854.48
Deposits applicable to concession requests and lease, less reserve $860.00	3,000.00	
Investment in Bolivian American Oil Company	79,563.12	
Non-current receivables, less reserve $5,869.02	2,517.68	
		85,080.80
Deferred expenses:		
Discount on debentures, including the par value of 26,000 shares of the company issued for services, less amortization $21,352.16	9,947.84	
Deferred organization and promotion expenses, less amortization $16,438.40	25,805.92	
		35,753.76
		$912,572.92

Thus, the assets are shown in the amount of $912,572.92. It will be noted that such assets include the Bolivian investments in the amount of $79,563.12, which, being beyond the jurisdiction of the Government of Cuba, is a deductible item, leaving a net asset total of $833,009.80. Claimant's current liabilities in Cuba, including accounts payable, salaries and taxes payable, were, in the amount of $196,632.36.

With respect to the liabilities, the Commission has consistently not deducted liabilities of a corporate claimant organized in the United States as it may remain liable for such obligations. However, the Commission finds that claimant's losses must be off-set by $539.22, the amount of taxes owed to the Government of Cuba on that date by the subsidiaries. (See *Claim of Simmons Company*, Claim No. CU-2303.) Accordingly, the Commission concludes that the adjusted value of the Cuban subsidiaries is $832,470.58 and that claimant suffered a loss in this amount within the meaning of Title V of the Act.

The Commission has decided that in certifications of loss on claims determined pursuant to Title V of the International Claims Settlement Act of 1949, as amended, interest should be included at the rate of 6% per annum from the date of loss to the date of settlement (see *Claim of Lisle Corporation*, Claim No. CU-0644), and in the instant case it is so ordered.

The following Certification of Loss will be entered and in all other respects the Proposed Decision is affirmed.

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CERTIFICATION OF LOSS

The Commission certifies that CONSOLIDATED DEVELOPMENT CORPORATION, formerly known as LIBYA MERCURY PETROLEUM CORPORATION suffered a loss, as a result of actions of the Government of Cuba, within the scope of Title V of the International Claims Settlement Act of 1949, as amended, in the amount of Eight Hundred Thirty-Two Thousand Four Hundred Seventy Dollars and Fifty-Eight Cents ($832,470.58) with interest thereon at 6% per annum from November 23, 1959 to the date of settlement.

Dated at Washington, D. C., and
entered as the Amended Proposed
Decision of the Commission

JUN 30 1971

s/ Lyle S. Garlock
Lyle S. Garlock, Chairman

s/ Theodore Jaffe
Theodore Jaffe, Commissioner

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The statute *does not provide for the payment of claims* against the Government of Cuba. Provision is only made for the determination by the Commission of the validity and amounts of such claims. Section 501 of the statute specifically precludes any authorization for appropriations for payment of these claims. The Commission is required to certify its findings to the Secretary of State for possible use in future negotiations with the Government of Cuba.

NOTICE — Pursuant to the Regulations of the Commission, if no objections are filed within 15 days after service or receipt of notice of this Amended Proposed Decision, the decision will be entered as the Final Decision of the Commission upon the expiration of 30 days after such service or receipt of notice, unless the Commission otherwise orders. (FCSC Reg., 45 C.F.R. 531.5(e) and (g), as amended (1970).)